FILED

No. 09-759

IN THE

Supreme Court of the United States

EXELON CORPORATION,

Petitioner,

v.

THE ILLINOIS DEPARTMENT OF REVENUE AND BRIAN A. HAMER, AS DIRECTOR OF REVENUE,

Respondents.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 15.8, Petitioner Exelon Corporation ("Exelon") files this Supplemental Brief in Support of Petition for Writ of Certiorari to bring to the Court's attention the petition for writ of certiorari and related briefing in *Triple-S Management v. Municipal Revenue Collection*, No. 09-233 (petition attached as App. A).

On January 11, 2010, this Court invited the Solicitor General to submit a brief in the *Triple-S* case before the Court decides whether to grant certiorari. (Order attached as App. B.) Although the *Triple-S* petition was filed before Exelon's petition, the Court's invitation to the Solicitor General called *Triple-S* to Exelon's attention.

ARGUMENT

The petition in *Triple-S* asks this Court to resolve a question closely related to one of the questions presented in Exelon's petition: whether the Due Process Clause limits the ability of a governmental entity, other than a legislature, to impose lengthy retroactive tax liability. *Triple-S* addresses the power of a Puerto Rican executive agency to do so; this case addresses the power of a state's judiciary to do so.

In *Triple-S*, the Department of Treasury in Puerto Rico classified petitioners Triple-S, Salud Inc. and its parent company, Triple-S Management, Corp. (collectively, "Triple-S"), as tax-exempt for nearly thirty years. (Pet. App. A at 15a.) In 2003, however, the department changed its view and concluded Triple-S was not entitled to tax-exempt status. (*Id.* at 19a.) In 2003, Treasury applied the new status only

prospectively as to Triple-S's income taxes, but in 2006, another agency applied it retroactively, creating fifteen years of retroactive property tax liability. (*Id.* at 14a, 19a-20a.) Triple-S filed suit, challenging the retroactive taxation as violating the Constitution's Due Process Clause. (*Id.* at 14a-15a, 20a-23a.) The courts below effectively decided that curing the prior mistaken interpretation of the law sufficiently justified the extensive period of retroactivity, and that the initial interpretation could be treated as null and void from the start. (*Id.*) Triple-S's petition to this Court followed.

Exelon's case is analogous to *Triple-S*. In *Triple-S*, the executive agency imposed a 15-year retroactivity term by claiming it was "correcting" its prior documented interpretation of the law. In Exelon's case, a state court imposed a 14-year period of retroactivity by refusing to apply what it admits is the correct interpretation of the law. In both cases, the retroactive governmental action created significant tax liability – 15 years of back property taxes for the previously tax-exempt *Triple-S* petitioners, and for Exelon, nearly $80 million in tax credits denied incorrectly as a matter of law.

The retroactive governmental action in Exelon's case, however, offends due process principles even more egregiously than that in *Triple-S*. The lower courts in *Triple-S* justified their approval of the agency's retroactive action in part by reasoning that the agency was curing its prior incorrect interpretation of the law. (*Id.* at 20a-23a.) Here, no similar purported "justification" exists: the Illinois Supreme Court announced the correct interpretation

of the law in Exelon's case (addressing tax years 1995 and 1996), but – on denial of rehearing – refused to apply it in this case, a pending case involving tax years 1997 through 1999 (even though that case was stayed pending the resolution of this case), and the remaining open tax years for which Exelon was eligible for the tax credit, 2001 through 2008. (Exelon Pet. 3 n.2, 5-6.) The Illinois Supreme Court was not curing a prior incorrect interpretation, nor did it announce a change in the law. Rather, that court enshrined the Illinois Department of Revenue's *in*correct interpretation of the law despite its conclusion that the state legislature had intended the opposite result. (*Id.* at 9-11.) In this way, Exelon's retroactive tax liability is even more harsh, oppressive, and unjustified than that imposed in *Triple-S*.

However, both *Triple-S* and this case highlight an open question in this Court's tax retroactivity jurisprudence – whether due process allows retroactive tax burdens imposed by a government entity other than a legislature, when under *United States v. Carlton*, 512 U.S. 26 (1994) and other of this Court's cases, those same retroactive burdens would violate the Due Process Clause if enacted by a legislature. As both Triple-S and Exelon argue, the retroactivity limits provided by the Due Process Clause apply to *all* governmental bodies, not just legislatures. (Exelon Pet. 7, 12-15; Pet. App. A at 30a-31a.) Indeed, if (as this Court has repeatedly held) due process limits retroactive legislative action, it must also limit such action by courts and administrative agencies. That both of these cases are

before the Court within such a short span of time proves the importance of resolving this question. The Court should grant certiorari here to do so.

CONCLUSION

For the foregoing reasons, along with the reasons expressed in Exelon's petition for a writ of certiorari, Exelon respectfully urges the Court to grant certiorari in this case.

In the alternative, Exelon requests that the Court hold this case and decide it in conjunction with the *Triple-S* case. In its petition for a writ of certiorari, Triple-S alternatively requested this Court to hold its case pending the outcome of *Stop the Beach Renourishment, Inc., v. Florida Department of Environmental Protection,* No. 08-1151, on which the Court heard oral argument on December 2, 2009. (Pet. App. B.) For the reasons set forth therein, if this Court decides to hold the *Triple-S* case pending the Court's decision in *Stop the Beach Renourishment*, it also should hold this case.

Respectfully submitted,

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Appendix

Appendix A

No. 09-233

In the
Supreme Court of the United States

TRIPLE-S MANAGEMENT, CORP.;
TRIPLE-S SALUD, INC.,
Petitioners,

v.

MUNICIPAL REVENUE
COLLECTION CENTER (CRIM),
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Puerto Rico

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For nearly 30 years, the executive branch invited specific reliance on its interpretation of law by issuing numerous authoritative, formal, and expressly binding rulings that a private entity was legally entitled to tax-exempt status as long as it complied with a long list of conditions. The executive branch then reversed its legal position. Rather than make that change prospective only, however, it reached back to impose 15 years of retroactive financial liability as well.

The question presented is:

Is the executive branch, unlike the legislative branch, free of all due process constraints on retroactive government action, no matter how far back in time that retroactivity runs, how harsh and oppressive the retroactivity might be, how justified a private entity's reliance might be, or whether the government has any rational basis for making its change retroactive, as long as the executive branch asserts that its earlier interpretation of law was "wrong?"

RULE 14.1(b) STATEMENT

The following are the parties to the proceeding in the Supreme Court of the Commonwealth of Puerto Rico:

1. Triple-S Management, Corp.
2. Triple-S, Inc. (now, Triple-S Salud, Inc.)
3. Centro De Recaudaciones De Ingresos Municipales [Municipal Revenue Collection Center]

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Triple-S Management, Corp. and Triple-S Salud, Inc., respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the Commonwealth of Puerto Rico.

OPINIONS BELOW

The orders and judgment of the Supreme Court of Puerto Rico are at App. 89–100. The opinion of the Court of Appeals is reprinted at App. 1, and the opinions of the Court of First Instance are reprinted at App. 43–88.

JURISDICTION

The Supreme Court of Puerto Rico issued its order denying certiorari on March 13, 2009. App. 89. Petitioners' timely final petition for rehearing was denied by order officially notified and recorded on May 27, 2009. App. 97. This Court has jurisdiction under 28 U.S.C. § 1258.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional provisions and statutes are set forth at App. 101–130.

STATEMENT OF THE CASE

A. Factual Background

The undisputed facts in this case are simple and straightforward. They present one of the most extreme examples of government-imposed retroactive financial liability ever presented to this Court. For nearly 30 years, through at least six

different formal, final, and binding administrative rulings, state administrative entities that had been delegated enforcement power over the local tax codes concluded that petitioners were entitled to tax-exempt status as a matter of law. Moreover, the agencies' formal published guidelines expressly promised that rulings of this sort were binding and would be revoked or modified, if at all, only prospectively. App. 131–173, 180–216. Then, in 2003 and 2006, these agencies decided to make a 180-degree about-face in their interpretation of the law. App. 174–179. They notified petitioners that, based on a changed interpretation of law, they were revoking their earlier rulings. Rather than make this new interpretation prospective—to which petitioners would have no constitutional objection—one agency demanded retroactive payment of taxes reaching back 15 years.

The courts below rejected petitioners' due process challenge on the theory that agencies are entitled to change their interpretations of law and to apply them retroactively simply by declaring an earlier interpretation "wrong." Moreover, the lower courts held that agencies may do so without giving any justification at all for the length of the retroactivity period or taking into account the nature of the justifiable reliance interest private parties possess based on prior, consistent, formal, final, and expressly binding agency interpretations. Thus, under the rulings below, the executive branch can always change its interpretation of law and make those changes as retroactive as it likes—regardless of how harsh and oppressive that retroactivity might

be, and how justified private reliance on nearly 30 years of authoritative, consistent, regularly reaffirmed interpretations to the contrary might be—because due process has no application when agencies change their legal interpretations retroactively. All an agency need do, and all the agency did here, is announce that its prior interpretation of the law was "wrong."

Petitioner Triple-S, Salud Inc. ("Triple-S")[1] is a health insurance provider in Puerto Rico and successor to an entity founded in 1959 to provide pre-paid, low-cost medical and hospital insurance to Puerto Rico's middle and working classes. Triple-S Management, Corp. is the parent company of Triple-S. For nearly 30 years, from July 16, 1976 until July 31, 2003, the Department of the Treasury in Puerto Rico ("Treasury") issued numerous formal rulings that recognized Triple-S's entitlement to income and property tax exemption. Treasury repeatedly concluded that Triple-S qualified for tax-exempt treatment by operating as a non-profit entity. *See* Puerto Rico Property Tax Act, P.R. Laws Ann. tit. 13, § 551(t) (repealed 1991), App. 115; Puerto Rico Income Tax Act of 1954, P.R. Laws Ann. tit. 13, § 3101(8) (repealed 1994), App. 124; *see also* 21 L.P.R.A. § 5151(g), 13 L.P.R.A. § 8506(6) (current versions of statutes).

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[1] Triple-S, Inc., a petitioner in the Puerto Rico Supreme Court, changed its corporate name to Triple-S Salud, Inc. in February 2009. For simplicity, the petitioners will be referred to as "Triple-S."

Puerto Rico's income tax laws grant an exemption to "organizations that are not organized for purposes of profit but rather that function exclusively for the promotion of social welfare" and "the net earnings of which are dedicated exclusively to charitable, educational, or recreational purposes." P.R. Laws Ann. tit. 13, § 3101(8), App. 124. Like similar federal and state tax exemptions, the purpose of this exemption is to encourage such organizations to devote their resources to the public welfare rather than private profit. Although Triple-S was formally incorporated as a for-profit entity in 1959, there is no dispute that it did so only because incorporating as a non-profit entity was not feasible for an insurance provider under Puerto Rico law at the time. App. 131, 132, 145–151. As Treasury concluded, from its inception Triple-S operated in fact as a non-profit entity. The subscribers of Triple-S, doctors and dentists only, relinquished any right to dividends. Treasury noted that Triple-S regularly filed numerous sworn assurances with Treasury that Triple-S operated as a non-profit organization that did not pay dividends or bestow assets on shareholders, and that it was in fact dedicated to promoting social well-being by offering affordable health insurance to a segment of the Puerto Rican population that, up to that point, had no options for health insurance. App. 132–133, 138–140, 145–147.

Because Triple-S was operating as a non-profit entity for all relevant purposes, Treasury concluded that Triple-S was entitled to tax-exempt status for income-tax purposes, but only as long as it complied with approximately five pages of rigorous terms and

conditions Treasury laid out. App. 133–135, 138–140. Treasury first reached this conclusion in two rulings in the 1970s, App. 131–141, then reaffirmed it in subsequent decisions over the next two decades. App. 141–160. Each of these Treasury rulings required Triple-S to comply with numerous conditions, including ones that limited the compensation of Triple-S's officers and directors, required Treasury-specified levels of reserve requirements, required Triple-S to invest its surplus in a defined manner (to lower premium costs), and required annual filings that included sworn assurances regarding Triple-S's operations. In direct, specific reliance on these binding rulings—including that any change in Triple-S's tax status would be prospective only—Triple-S complied with all the conditions designed to ensure its substantive non-profit status.

Treasury revisited the status of Triple-S for a fourth time in 1987 when it considered Triple-S's request for tax exemption on all of its real and personal property. Once again, Treasury concluded that Triple-S was legally entitled to tax-exempt status, this time under the property tax law, P.R. Laws Ann. tit. 13, § 551(t) (repealed 1991). Again, Treasury issued a letter ruling to this effect. App. 142.

In 1991, the Puerto Rico Legislature created the Municipal Revenue Collection Center (known as CRIM, for its Spanish acronym), a new entity to take over Treasury's powers to collect real and personal property taxes. The new law transferred to CRIM all

"the obligations" of Treasury regarding personal and real-property taxes, as well as Treasury's "powers and functions." Act of Aug. 30, 1991, No. 80, § 23(f), App. 119. In 1998, CRIM found that Triple-S continued to be legally entitled to the property tax-exemption that Treasury had recognized previously. In addition, CRIM ruled that "the rights acquired by Triple-S [under the Treasury rulings] will continue in effect" under the laws CRIM enforced. App. 163. That same year, Treasury also reaffirmed the income tax exemption for Triple-S. Together, then, Treasury and CRIM considered Triple-S's tax status on six separate occasions and reached the same conclusion each time: Triple-S was legally entitled to tax-exempt status for income and property taxes.

Treasury's determinations were formal and binding. Treasury made its rulings in formal Administrative Determination Letters ("Letter Rulings"). These letters, modeled after Internal Revenue Service ("IRS") letter rulings, are "official interpretations by the Department as to the application of the Code, or any other tax law, to the acts or transactions represented by the taxpayer." App. 180. These Letter Rulings are "binding on the Department as long as the representations upon which the ruling was based reflect an accurate statement of the material facts with respect thereto, and the transaction was carried out as proposed, and there has been no change in the law and regulations that apply" to the relevant period. App. 186. Triple-S provided full and accurate information at all times and met all the terms and conditions set by Treasury. There has never been any allegation to

the contrary. Thus, Triple-S complied with all of Treasury's requirements for tax-exempt status under its Letter Rulings.

Although Puerto Rico did not change its tax laws in any relevant respect, in July 2003, Treasury changed its view of the proper income tax treatment of Triple-S. Specifically, in what Treasury itself called a "new public policy," Treasury came to the view that entities had to be formally incorporated and organized as non-profit entities to receive the tax exemption, regardless of whether they functioned in fact as non-profits. App. 175. Treasury, for its part, did not seek to change Triple-S's income tax-exempt status retroactively. Rather, Treasury followed its internal rules against taxing entities retroactively as long as there were no omissions or misstatements of facts, no changes in the applicable law or regulations, and the taxpayer relied in good faith on a Letter Ruling. Treasury simply determined that, going forward, Triple-S would no longer be exempt from income taxes. Triple-S has not objected to this conclusion.

CRIM also decided to change Triple-S's property tax status. But, unlike Treasury, CRIM demanded retroactive taxes from Triple-S going all the way back to the year of CRIM's inception—despite the many previous binding rulings from Treasury and CRIM over nearly 30 years that Triple-S was tax exempt, and despite CRIM's recognition in 1998 that Triple-S was entitled to rely on these prior rulings. In March 2006, CRIM issued tax notices informing Triple-S that it was revoking Triple-S's real and

personal property tax exemptions and that its ruling would apply retroactively to personal property taxes from 1991, the year when CRIM was first established, and to real property taxes from fiscal year 1992-1993 onward. The only reason CRIM did not go even further back in seeking retroactive taxes is that CRIM did not exist until 1991; otherwise, CRIM presumably would have demanded retroactive taxes going back to the beginning of Triple-S's existence. There is no other limiting principle in the agency's or the lower courts' theory of retroactivity; that theory sweeps back literally to the creation of CRIM or the taxpayer. CRIM did not base its decision to impose retroactive taxes on a conclusion that Triple-S had provided factually misleading or incomplete information. Nor did CRIM refute the fact that Triple-S acted in good-faith reliance on the binding Letter Rulings from Treasury and on CRIM's own reaffirmation of Triple-S's tax-exempt status. CRIM simply changed its mind about the meaning of the operative legal provision and sought to have that shift in position apply retroactively, despite Triple-S's good faith reliance on the government's previous formal orders.

B. Proceedings Below

Triple-S filed two separate complaints, on March 28, 2006 and May 24, 2006, in Puerto Rico state court challenging CRIM's retroactive imposition of real- and personal-property taxes on federal constitutional and other grounds, including a claim that the taxes violated the federal Due Process

Clause. Triple-S did not challenge its obligations to pay taxes prospectively.

Without separately considering the Due Process Clause claim, the Court of First Instance rejected Triple-S's claims on a motion for summary judgment. App. 46. The trial court concluded that, because the agency's new interpretation was "correct," all the prior binding administrative rulings were irrelevant for constitutional purposes. The trial court gave no weight to the reliance interests Triple-S had in the six rulings by Treasury and CRIM that granted Triple-S tax-exempt status on the basis that Triple-S was operating for all relevant purposes as a non-profit. The trial judge also concluded that due process imposed no limit on the retroactive change in interpretation. Instead, the trial judge held that, despite Treasury's longstanding, consistent, prior rulings, Puerto Rico's tax laws required formal incorporation as a non-profit to receive non-profit tax status. Thus, the trial judge reasoned that those earlier rulings were "ultra vires, contrary to the law, and, therefore, null." App. 84. Despite the formality of the Letter Rulings and Triple-S's good-faith reliance on them, the trial judge ruled as if those Letter Rulings had never existed. The judge also thought that curing past legal "mistakes" was a sufficient justification to answer any due process concerns. According to that reasoning, CRIM was free to act as if it was operating on a blank slate. With the stroke of a pen, the trial judge thus erased the six formal rulings made over a span of 27 years by CRIM and its predecessor agency. Even though Triple-S designed its operations in good-faith

reliance on those rulings and neither the law nor the facts had changed, the trial court decided that Triple-S had no valid constitutional claim.

In a consolidated appeal involving both the real- and personal-property tax cases, the Court of Appeals affirmed in an opinion that mirrored the reasoning of the lower court. Specifically, the Court of Appeals agreed that Triple-S could not object to the retroactive imposition of taxes because the earlier decisions by Treasury and CRIM could be treated as "null and void" from the start. App. 37–38. In the view of the Court of Appeals, the plain language of Puerto Rico's tax law required formal incorporation status as a non-profit—even when such incorporation was impossible and the entity operated for all intents and purposes as a non-profit in fact, pursuant to specific limitations and conditions the Treasury demanded. App. 35, 37. The fact that Treasury and CRIM, the agencies charged with enforcing the law, had concluded otherwise for more than 27 years, or that Triple-S had structured itself in good-faith reliance on those agency interpretations, was of no legal relevance to the Court of Appeals. The court held that the earlier actions should be regarded as "ultra vires" and hence that CRIM could change course as if these earlier rulings and the justifiable reliance they had induced had never occurred. App. 39-40. Thus, by pretending the executive branch's longstanding, formal, authoritative, and binding prior legal rulings had never happened, an agency was free, constitutionally, to give its changed legal

interpretation as massive a retroactive effect as it cared to impose.

The Supreme Court of Puerto Rico denied certiorari. App. 89–92. Petitioners raised their federal constitutional claim at every opportunity: in their complaints, their summary judgment papers before the trial court, their briefs on appeal, and their petition for certiorari to the Puerto Rico Supreme Court. The courts below uniformly rejected petitioners' due process arguments and concluded that nothing in the Due Process Clause limits the authority of the executive branch to impose massive retroactivity as long as the earlier agency position that induced reliance is deemed "wrong."

REASONS FOR GRANTING THE PETITION

The courts below decided an important question of federal constitutional law in a way that is at odds with bedrock constitutional principles and many decisions of this Court on retroactive government action. The Court has recognized, under numerous constitutional provisions, that retroactive legislation raises acute concerns about violating what this Court has characterized as "fundamental notions of justice" recognized since the Framing. The decision below conflicts with those cases, and raises broad issues of general importance, by holding that these principles are inapplicable when it comes to retroactive administrative changes in policy and law. This Court's intervention is needed to address whether, and to what extent, the same constitutionally based "fundamental notions of justice" reflected in this Court's retroactivity decisions limit the power of

agencies to destroy reasonable, investment-backed private reliance interests when agencies change their interpretations of law and apply those interpretations retroactively.

The courts below thought the Constitution gave *carte blanche* for administrative retroactivity, no matter the scope or justification, as long as the agency asserts that its change in legal interpretation "corrects" a prior view. In addition to being in tension with this Court's decisions, that position conflicts with that of several federal Courts of Appeal. This case presents an important opportunity to clarify this Court's doctrines governing due process limits on administrative retroactivity. By determining the due process limits on the retroactivity of agency interpretations of law, the Court's decision in this case would clarify what has become a fundamentally uncertain area of law since this Court's last decision on the topic, *Bowen v. Georgetown University Hospital,* 488 U.S. 204 (1988), decided more than twenty years ago.

In addition, this Term the Court will hear a case that addresses whether retroactive judicial changes in common-law rules can violate the Due Process Clause. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.,* 998 So. 2d 1102 (Fla. 2008), *cert. granted,* No. 08–1151, 129 S. Ct. 2792 (June 15, 2009). Surely it would be an odd constitutional logic that would place constitutional limits on legislative and judicial retroactivity while leaving agencies completely immune from similar constraints. Yet that is precisely what the decisions

below do. At a minimum, this petition should be held until the Court decides *Stop the Beach* and can consider the implications of its decision for this case.

I. THE DUE PROCESS CLAUSE IMPOSES LIMITS ON ADMINISTRATIVE RETROACTIVITY.

1. Two preliminary points should be noted. First, this Court has held that the Due Process Clause, as well as numerous other provisions of the Constitution, applies to Puerto Rico. *See generally Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 331 n.1 (1986); *Rodriguez v. Popular Democratic Party,* 457 U.S. 1, 7 (1982); *Torres v. Puerto Rico,* 442 U.S. 465, 471 (1979).[2] Second, petitioners could protect their due process rights in this case only through litigation in the Puerto Rico courts and in this petition for certiorari. The Butler Act, a statute analogous to the Tax Injunction Act, 28 U.S.C. § 1341 (2009), specifically denies federal district courts in Puerto Rico the power to hear any suit "for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico." 48 U.S.C. § 872 (2009). This Court is the only federal forum in which petitioners' due process rights can be vindicated.

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[2] The Court has not decided more specifically whether it is the Due Process Clause of the Fifth or the Fourteenth Amendment that binds Puerto Rico. *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 668–669, n. 5 (1974). Because the Fifth Amendment Takings Clause is incorporated through the Fourteenth Amendment Due Process Clause, this petition's Taking Clause arguments are subsumed in the petition's Due Process Clause arguments.

2. On the merits, this Court has recognized, in area after area of law, that retroactivity is disfavored "in accordance with 'fundamental notions of justice' that have been recognized throughout American and English legal history." *Eastern Enters. v. Apfel,* 524 U.S. 498, 532 (1998) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). Thus, the Court has held that an independent rational justification for a statute's retroactive application must exist above and beyond the justification that suffices for the statute's prospective effect; the Due Process Clause provides special protection for "the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 266 (1994); *see also Eastern Enters.,* 524 U.S. at 558 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting) (concluding that the Due Process Clause protects against "an unfair retroactive assessment of liability [that] upsets settled expectations" because a law that does so "undermines a basic objective of law itself" that "hearkens back to the Magna Carta").

Under the Takings Clause, the Court has held legislation unconstitutional "if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of the liability is substantially disproportionate to the parties' experience." *Eastern Enters.,* 524 U.S. at 528–29. Under the Contract Clause, the Court has noted that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective

legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *see also United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977). In interpreting statutes, the Court has enforced a strong presumption against reading statutes to be retroactive, absent a clear statement from Congress itself. *Landgraf*, 511 U.S. at 280. In administrative law, the Court has held that federal agencies do not have the power to adopt retroactive regulations unless Congress has expressly delegated such an extraordinary power. *Bowen*, 488 U.S. at 208; *see also United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973) (holding that when private actors have relied in good-faith on consistent, longstanding administrative interpretations of law, "traditional notions of fairness" preclude the government from prosecuting based on alternative interpretation). Finally, in its separation-of-powers jurisprudence, the Court has held that Congress acts unconstitutionally when it retroactively tries to re-open final judicial judgments. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995).

3. Even in the area of taxation, where the Court has been somewhat more tolerant of retroactive legislation, the Court has nonetheless consistently held that courts must scrutinize such legislation carefully to ensure it satisfies a two-part test: the retroactivity must itself have a rational purpose and the period of retroactivity must be modest. *United States v. Carlton*, 512 U.S. 26, 30–32 (1994); *see also Welch v. Henry*, 305 U.S. 134, 147 (1938) (noting

that due process is violated when "retroactive application [of tax legislation] is so harsh and oppressive as to transgress the constitutional limitation"). Accordingly, the brief periods of retroactive taxation that this Court has upheld have extended back no farther than the date at which the change in taxation was proposed—typically, a period of a year or less before the date of the tax change's enactment. *See Carlton,* 512 U.S. at 37–38 (O'Connor, J., concurring) (in "every case in which we have upheld a retroactive federal tax statute against a due process challenge the law applied retroactively for only a relatively short period"). The Court has upheld brief periods of retroactivity on the theory that the government may reasonably prevent taxpayers from taking advantage of "a lengthy legislative process" by avoiding tax liability while the legislature debates statutory revisions. *See, e.g., United States v. Darusmont,* 449 U.S. 292, 296–97 (1981) (*per curiam*) (upholding 10-month retroactivity on the ground that this "customary congressional practice" generally has been "confined to short and limited periods required by the practicalities of producing national legislation."); *see also Carlton,* 512 U.S. at 38 (O'Connor, J., concurring) (a "period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise ... serious constitutional questions"). No justification of that sort is present here. In this case, the agency imposed 15 years of retroactive tax liabilities after it had encouraged investment-backed reliance on its prior legal interpretation.

In addition to considerations of justified reliance and fairness, retroactive government action also risks a "temptation to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 266. As Justice Kennedy has noted:

> If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership. As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity. Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them. Both stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation.

Eastern Enters., 524 U.S. at 548–49 (Kennedy, J., concurring in the judgment and dissenting in part). The Court has recognized a fortress of protections that secure justified, investment-backed reliance, but the decisions below blast a gaping hole for retroactive agency interpretations of law.

4. The question in this case, of broad general importance, is whether these same principles have any application to agency decisions to make changes in interpretation of law retroactive, especially when an agency's formal policies expressly invite investment-backed reliance by stating that any change in interpretation will be prospective only. If a legislature decided to amend a tax statute and reach back 15 years to tax, such a law would surely be unconstitutional under *Carlton* and related cases. In this case, Treasury adopted what it itself declared to be a "new public policy" regarding interpretation of the tax code. App. 175. The question presented here is stark: whether due process is *irrelevant*, as the courts below in effect held, when an agency, rather than a legislature, adopts a "new public policy" under the guise of interpretation.

As a general matter, the principles that disfavor retroactive enforcement of legal change apply to administrative agencies as well as to legislatures. *See Bowen,* 488 U.S. at 208 (because "[r]etroactivity is not favored in the law," "congressional enactments *and administrative rules* will not be construed to have retroactive effect unless their language requires this result") (emphasis added). No justification in principle or precedent exists for concluding that due process limits on retroactivity constrain legislatures but somehow leave the executive branch completely unfettered. No less than statutes, administrative rules and orders can give rise to private expectations protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. *See, e.g., Perry v. Sindermann,* 408 U.S. 593, 602-03 (1972) (noting

that "rules and understandings, promulgated and fostered by state officials" may create a property interest protected by the Fourteenth Amendment's Due Process Clause).

The various constitutional principles that limit the power of legislatures to disrupt settled expectations must limit less-democratically accountable administrative agencies as well. The legislature cannot delegate to an agency a power that the legislature itself is constitutionally prohibited from exercising. *Cf. Arizona Grocery Co. v. Atchison, Topeka, & Santa Fe Ry.*, 284 U.S. 370, 388 (1932) (the Commission's action "in fixing such rates for the future is subject to the same tests as to its validity as would be an act of Congress intended to accomplish the same purpose").

5. This is not to say that the general due process constraints that limit legislative retroactivity apply identically in the administrative context. The Due Process Clause prohibits government from retroactively disrupting the settled expectations of private persons who *reasonably rely* on prior law. In the agency context, for example, a legislature might not confer power on agency officials to make binding commitments to private parties; in that case, any reliance by private citizens would not be reasonable and principles of due process or equitable estoppel would not bar agency officials from reversing their own illegal actions on which those citizens may have relied. *See, e.g., Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 426 (1990). Agency rules and orders might also indicate implicitly or explicitly that they

lack binding force of law. Informal guidance documents and other non-binding interpretative rules, for instance, do not purport to set forth legally enforceable rules that bind either the government or private parties. *See, e.g., Gehl Co. v. Commissioner of Internal Revenue,* 795 F.2d 1324, 1333 (7th Cir. 1986) ("as a general rule, informal Treasury publications and pamphlets ... do not bind the government" and, because they "are simply guides, ... a taxpayer who relies on them generally does so at his own peril").

But this case poses a simpler and more fundamental issue. If, as here, an agency has undisputed statutory authority to issue binding assurances about the meaning of a statute and the agency exercises such authority to give assurances to private actors that a current rule or order will not be overturned retroactively, due process must then bar an agency from disrupting citizens' reliance on such statements through retroactive reversal of such rules or orders. Due process must constrain the power of agencies that formally bind themselves to non-retroactivity from then turning around and reversing their own rules and orders. Agency interpretations of law can justifiably generate reasonable, investment-backed reliance, as in this case, and the agency's destruction of that reliance can therefore similarly violate due process. At a minimum, due process must ensure that agencies not willfully induce citizens to rely on rulings and to make substantial investments that the agency then destroys by violating its own statutorily authorized, formal policies and promises.

II. THE COURTS BELOW WRONGLY HELD AGENCIES IMMUNE FROM DUE PROCESS LIMITS ON RETROACTIVE POLICYMAKING BY ALLOWING AN AGENCY TO "CORRECT" PRIOR RULINGS WITHOUT REGARD TO THE REASONABLENESS OR EXTENT OF PRIVATE, INVESTMENT-BACKED RELIANCE ON THOSE EARLIER RULINGS.

The central question at stake here is whether due process applies at all when agencies change their interpretations of law retroactively. The Court should grant *certiorari* to resolve that threshold issue. But in resolving that question, the Court should clarify that three essential principles, reflected in the Courts' retroactivity cases, should guide the determination whether an agency's retroactive reversal of its interpretation of law is consistent with due process or impermissibly destroys reasonable, investment-backed reliance: First, whether the agency has statutory authority to issue self-binding interpretations of law and has exercised that authority. Second, whether the private reliance that the agency's interpretation induced was reasonable. Third, whether the period of retroactivity is so severe in length as to be exceptionally harsh and oppressive under this Court's precedents. The retroactive administrative action in this case violates all three of these principles. Thus, this case presents a good vehicle for establishing the due process boundaries on retroactive agency interpretation of law.

A. Treasury Had Statutory Authority To Issue Self-Binding Letter Rulings Regarding Specific Taxpayers.

There is no dispute that Treasury was the agency charged with implementing Puerto Rico's tax code when it issued the income tax Letter Rulings at issue in this case. At the time the income tax Letter Rulings were issued, the authority was found in title 13, section 3429(a) of the laws of Puerto Rico. Puerto Rico Income Tax Act of 1954, P.R. Laws Ann. tit. 13, § 3429(a) (repealed 1994) ("The Secretary shall promulgate the necessary rules and regulations to enforce this Subtitle"). Equally clear, the Secretary had the power to define the retroactive effect of any "Treasury decision." Puerto Rico Income Tax Act of 1954, P.R. Laws Ann. tit. 13, § 3429(b) (repealed 1994). Furthermore, there is no dispute that Treasury was the agency charged with implementing Puerto Rico's property tax law when it issued the property tax Letter Ruling in 1987. At the time it issued the property tax Letter Ruling, Treasury's authority was codified in 13 L.P.R.A. § 3473. P.R. Laws Ann. tit. 13, § 473 (the "Secretary is authorized to publish all regulations, orders and instructions that are necessary for the execution of Title IX of the Political Code..."). All the relevant rulings were issued not by low-level administrative agents, but at highest levels of the Treasury, such as by subcabinet secretaries. App. 136, 141, 144, 160.

These grants of power are substantially identical to, and indeed were modeled on, statutory language conferring power on the U.S. Secretary of the

Treasury to implement the Internal Revenue Code through (among other decisions) private letter rulings to taxpayers. This power to issue private letter rulings has long been used by the IRS to issue rulings binding on the IRS in relation to the taxpayer who requested the ruling. Rev. Proc. 2006-1, 2006-1 I.R.B. 1, § 11(.06) ("Where the revocation or modification of a letter ruling is for reasons other than a change in facts as described in section 11.05 ..., it will generally not be applied retroactively to the taxpayer for whom the letter ruling was issued or to a taxpayer whose tax liability was directly involved in the letter ruling."). Although some controversy exists over whether private letter rulings have precedential effect for third parties, *see* Benjamin J. Cohen & Catherine A. Harrington, *Is the Internal Revenue Service Bound by its Own Regulations and Rulings?*, 51 TAX LAW. 675 (1998), there is no controversy about the IRS's power to bind itself in relation to the specific persons who request its opinion in an official private letter ruling.

In light of these broad grants of authority, neither the courts below nor CRIM argued that Treasury lacked the statutory power to issue Letter Rulings to taxpayers providing them with binding guidance as to their tax liabilities. Instead, the courts below maintained that such letters could not be binding to the extent they contained errors of law, because such errors constituted "*ultra vires* acts by public officials" that "do not create rights, do not obligate the administrative organism, nor does it impede it from effectuating a correction." App. 39. In effect, the court below ruled that, despite the

existence of statutory authority to issue binding private Letter Rulings, the government must have the implied power to disregard its own assurances to taxpayers in order to correct what the government now believes was a mistake of law.

By overlooking Treasury's statutory authorization to issue binding Letter Rulings, the court of appeals ignored a constitutionally critical consideration for evaluating whether Triple-S acted reasonably in relying on Treasury's policies against retroactive changes in rulings. The general rule barring equitable estoppel against the government is fundamentally rooted in the notion that, absent legislation bestowing power on an official to bind the government, officials' representations about the law cannot estop the government from changing its views about the law's requirements. Critically, if the relevant statutes confer such power to issue binding rulings on officials, then this justification for the anti-estoppel rule evaporates. *See Office of Pers. Mgmt.*, 496 U.S. at 428 ("Congress may always exercise its power to expand recoveries for those who rely on mistaken advice should it choose to do so").

B. Triple-S's Reliance On Treasury's Prior Rulings Was Reasonable Because Treasury Had Expressly Given Assurances That Letter Rulings Would Not Be Retroactively Revoked.

The letter rulings in this case are fundamentally different in a second respect from any government action that this Court has permitted to be retroactively revoked. Treasury itself expressly

stated in official policy documents that its rulings would not be overturned retroactively with respect to the specific taxpayer to whom the earlier ruling had been issued. Circular 86-3, which Treasury issued in 1986, specifically states that, "[e]xcept in rare or unusual circumstances, the revocation or modification of a ruling or administrative determination will not be applied retroactively with respect to the taxpayer to whom the ruling was originally issued." App. 187. The Circular provides three conditions for the operation of this anti-retroactivity policy, and no dispute exists that all three are met in this case. The property-tax rulings that Treasury issued to Triple-S in 1987 were issued pursuant to the terms and policies of this Circular. In 1999, Treasury adopted a new Circular, 99-01, that included the same policy commitment against retroactivity. App. 212.

The basis of the 15-year retroactivity imposed in this case has nothing to do with any "rare and unusual circumstances" that justify departing from the anti-retroactivity policy to which Treasury committed itself and to which CRIM was also obligated. The agency's retroactive decision does not identify any such circumstances, nor do the decisions of the courts below. Instead, the lower courts believed it wholly sufficient to ask a completely different question: whether Treasury had erred in its earlier analysis of the tax code such that its earlier rulings were "null." In effect, this holding means that Treasury policies against retroactive changes are binding only until Treasury (or a successor agency) changes its mind about the ruling's merits—

a view that treats as legally irrelevant Treasury's own Circulars committing to a policy that its rulings would survive any later change of mind Treasury might have.

Treasury's endorsement of an anti-retroactivity policy distinguishes this case from other decisions in which this Court has upheld the retroactive repeal of agency rulings. In other contexts, the agency in question had never adopted policies or extended specific assurance that its ruling would not be retroactively revised. Absent such assurances, the Court has adopted the position that the agency reserves the power to correct its prior mistakes of law through retroactive revision of its earlier rulings. *See, e.g., Dixon v. United States,* 381 U.S. 68, 73 (1965). In such cases, any reliance would be unreasonable. Not so here.

This case is instead on par with decisions of lower courts that have held it an abuse of discretion for agencies retroactively to repeal their rulings after making assurances that the agency would forego retroactive changes. In *Lesavoy Foundation v. Commissioner of Internal Revenue,* 238 F.2d 589 (3d Cir. 1956), for instance, the Third Circuit held that the Commissioner abused his discretion by retroactively revoking a certificate of exemption given to the Foundation in 1945 and retroactively assessing the Foundation for five years of taxes between 1946 and 1951. Acknowledging that "the Commissioner may change his mind when he believes he had made a mistake in a matter of fact or law," the Third Circuit nonetheless noted that "it is

quite a different matter to say that ... the Commissioner may arbitrarily and without limit have the effect of that change go back over previous years during which the taxpayer operated under the previous ruling." *Id.* at 591. In finding that the administrative retroactivity was an abuse of discretion under the statute, the Third Circuit placed special emphasis on the individualized nature of the ruling and the Commissioner's past custom and written policy of not revoking retroactively exempt-status rulings as to the persons to whom they were issued. *Id.* at 591 & nn. 5–6.

Similarly, the Seventh Circuit in *Gehl Co. v. Commissioner of Internal Revenue,* 795 F.2d 1324 (7th Cir. 1986), held that the Commissioner abused his discretion in enforcing an interpretation of the disputed tax provision that was different from that contained in the IRS's handbook published for the guidance of taxpayers. *Id.* at 1333–34. While acknowledging that such guidance documents did not normally estop the government from changing its legal interpretations, the Seventh Circuit emphasized the specific assurance in the handbook stating that the handbook's interpretation would not be retroactively repealed, noting that such a statement was "more than an interpretation of existing law; it is an express promise that the Commissioner will not in the future exercise his discretion to apply adverse changes retroactively." *Id.* at 1333. According to the Seventh Circuit,

> This is a specific statement designed to elicit reliance on the part of taxpayers,

> as opposed to a typical publication which may well say nothing on the issue of the retroactivity of future changes. While silence on this subject may fairly be viewed as implicitly saying "beware to those who rely on this publication; you do so at your own peril," an express promise cannot fairly be construed in this fashion .... Not only did this promise reasonably induce reliance; the promise was originally made specifically to create such reliance. To allow the Treasury to renege on such express promises with impunity is grossly unfair. As the Second Circuit aptly noted, "the retroactive applications of regulations in the face of a promise of prospectivity smells of a bushwack."

Gehl Co., 795 F.2d at 1333 (citing *LeCroy Research Sys. Corp. v. Commissioner of Internal Revenue*, 751 F.2d 123, 124, 128 (2d Cir. 1984)).

These cases address the statutory "abuse-of-discretion" standard under the Internal Revenue Code, *see id.* at 1332, but should inform the analysis of whether administrative retroactivity, including that at issue here, disrupts reasonable reliance on government's commitments. Both the standards of constitutional due process and the statutory "abuse-of-discretion" standard incorporate concern for the disruption of private expectations. *See Anderson, Clayton, & Co. v. United States*, 562 F.2d 972, 981 (5th Cir. 1977).

As *Gehl Company* notes, such a flagrant disregard for the agency's own assurances to specific taxpayers approaches an impairment of the government's own contract with a private party. *Cf. United States v. Winstar,* 518 U.S. 839 (1996). In effect, Treasury entered into a bargain with Triple-S under which, in return for Triple-S's compliance with elaborate conditions insuring that Triple-S's resources were devoted to public health, the Treasury would treat Triple-S as a non-profit corporation for the purposes of taxation.

By operating under the terms of the exemptions stipulated in the rulings, Triple-S was required to invest its surplus in a defined manner (lower premium costs, etc.), was precluded from distributing dividends, and was required to structure itself in a variety of other ways. Had CRIM informed Triple-S in 1991 that it would not be entitled to the property tax exemptions that had originally been recognized by Treasury in 1987, Triple-S might well have foregone these costly measures and instead conducted business as a for-profit entity. Indeed, that is precisely what occurred in 2003 when Triple-S was notified that its tax exemption was going to be revoked prospectively: Triple-S decided to change its structure and corporate philosophy to that of a publicly traded for-profit corporation with the capacity to conduct its business and invest its surplus free from the requirements that the agency rulings had previously imposed.

Having secured public benefits from Triple-S for fifteen years, CRIM now seeks to renege on this

bargain in order to get the benefits of foregone property tax revenues that had been offered to induce Triple-S to maintain its public health commitment. To imagine a more direct violation of the *quid pro quo* inherent in the Treasury's tax ruling would be difficult. Such repudiation of government obligations meant to induce investment-backed reliance are not only unfairly manipulative to the individual, they are also detrimental to the long-term interests of government. *See Gehl Co.*, 795 F.2d at 1334; *see also* Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment,* 94 MICH. L. REV. 1129, 1139 (1996) (observing that "[b]ecause taxpayers who relied on the repealed incentive credit were 'burned' by the government, future incentive credits would have to be more generous (for example, the credit percentage would have to be greater to achieve the same amount of increased investment in the targeted asset or activity")).

C. The Burden On Triple-S's Expectations Was Extraordinarily Severe In Light Of The Extreme Length Of Retroactivity Imposed.

CRIM ruled that Triple-S owed property taxes for a retroactivity period of fifteen years, a period apparently based on nothing more than the fact that CRIM itself came into existence only in 1991. This breathtaking back-to-creation position knows no limits: if CRIM had existed in the late 1980s, its position is that it would be entitled to demand retroactive taxes reaching back over 20 years. As this Court has noted in the context of tax legislation,

limited periods of retroactivity are constitutionally permitted because they are justified by the legitimate interest in preventing taxpayers from avoiding imminent or pending changes in tax policy of which they have fair notice. *See supra* at 15–16. The length of the retroactivity period is highly relevant, therefore, to the constitutionality of administrative retroactivity. Due process requires that courts assess, as the courts below did not, whether an agency has a rational justification for the extent of the retroactivity and how harsh the retroactivity period is to private actors.

In sum, the courts below failed to give any weight to a private entity's reasonable, investment-backed reliance on expressly binding and statutorily authorized agency commitments. The decisions below ignore *all* the considerations offered above: the Treasury's specific policy guidelines stating that prior rulings would not be overturned retroactively, the statutory authorization for making binding Letter Rulings, the six formal, consistent rulings of tax-exempt status issued over nearly 30 years, and the extraordinarily long period of retroactivity. Instead of evaluating the reasonableness of Triple-S's reliance or the burden on Triple-S's expectations, the court of appeals rooted its holding in the sole consideration that all six of the earlier administrative rulings were erroneous. The paramount—indeed, exclusive—consideration in the court's due process analysis was that administrative agencies must have unlimited power to correct prior "mistakes" by retroactively overruling those mistakes.

This analysis amounts to blanket immunity for administrative retroactivity. Presumably, agencies do not reverse prior rules or adjudicated precedents unless they believe that the new decision better captures the language or purpose of the statute than the rules and precedents being reversed. And, if the new interpretation is not "correct," it will not be in effect, prospectively or retrospectively. To give agencies *carte blanche* regardless of the length of the retroactivity period, past assurances by the agency, or reasonableness of the private citizen's reliance is to eviscerate any due process restraint on retroactive agency policy-making. *Cf. Bowen,* 488 U.S. at 225 (Scalia, J., concurring) (noting that "curative retroactivity" would "make a mockery" of APA limits on retroactive rule-making because agencies would always be free to "reissue" a rule on a retroactive basis).

In order to place minimal outside limits on such regulatory uncertainty, due process requires that agencies and reviewing courts give at least some consideration to factors other than the agency's desire for the fullest retroactive enforcement of new policies and interpretations. These factors include the reasonableness of private reliance on the prior legal regime, the severity of the burden on private parties, the length of the retroactivity period, and the nature of the government's interest in retroactivity. Such factors have always been considered under constitutional retroactivity analysis. *See Carlton,* 512 U.S. at 27 (finding a rational basis for retroactivity because "Congress

acted promptly and established only a modest period of retroactivity").

III. THE TENSION BETWEEN *CHEVRON* AND RETROACTIVE AGENCY INTERPRETATIONS OF LAW FURTHER ENHANCES THE IMPORTANCE OF THE QUESTION PRESENTED.

The importance of the legal question presented here is magnified by the tension between the position the courts below adopted and the line of cases represented by *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), *National Cable & Telecommunications Assn. v. Brand X Internet Services,* 545 U.S. 967 (2005), and last Term's decision in *FCC v. Fox Television Stations, Inc.,* 129 S. Ct. 1800 (2009). These cases recognize that there may be a range of permissible agency interpretations of a statute, that a single "right" agency interpretation of a statute does not necessarily exist, and that agencies may legitimately adopt different positions over time concerning the meaning of a statute—including an interpretation that directly contradicts an earlier interpretation. *See, e.g., Smiley v. Citibank (S.D.), N.A.,* 517 U.S. 735, 742 (1996) (noting that "change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency"). But precisely because of the greater discretion the *Chevron* regime recognizes for agency legal interpretation, it becomes all the more imperative that, when agencies do change their legal

interpretations, agencies be constrained by the due process principles that apply to retroactive legal changes, including that there be adequate justification for the period of retroactivity that takes account of the change-in-position reliance interests that a prior, binding interpretation invited.

Before *Chevron*, rule-of-law values in the context of agency interpretations of law were enforced, in part, by this Court's reluctance to defer to agency interpretations that shifted dramatically over time. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (noting that the extent of judicial deference to an agency interpretation will vary depending upon that interpretation's "consistency with earlier and later pronouncements"); *see also* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 339 (6th ed. 2006) ("Before *Chevron*, courts held that longstanding and consistent agency interpretations were entitled to special deference; a showing that agencies had been inconsistent would reduce or eliminate deference to an agency interpretation of law."). Because *Chevron*, as elaborated in *Brand X* and *Fox*, permits agencies to be granted deference even for inconsistent interpretations of law, rule-of-law values require that courts ensure that retroactive application of changed agency legal interpretations be adequately justified. Otherwise, *Chevron* risks becoming a vehicle for undermining the core due process values of fair notice and justifiable reliance.

To be sure, *Chevron* does not directly apply of its own force to state agencies, as in this case. But the

general due process retroactivity principles remain the same: agencies may be free to change their legal interpretations prospectively, but when they seek to make those changes retroactive, the risks of exploiting vulnerable individuals or entities, and the potentially harsh and oppressive burdens of changes that undermine reasonable, investment-backed reliance interests, require at the least that such retroactive changes be justified by more than an agency's mere decision to adopt a "new public policy" concerning the meaning of a law. Moreover, the greater the flexibility federal agencies have to shift their policies, the more important these general due process principles become. As this Court noted in *FCC v. Fox Television Stations,* it would be arbitrary and capricious when agencies change their legal interpretations for an agency to ignore the fact that "its prior policy has engendered serious reliance interests that must be taken into account." 129 S. Ct. at 1811. Yet that is precisely what the agency and the courts below did here. The more free that agencies are to change their legal interpretations, the more important it becomes for courts to enforce against agencies, as the Court has long done against legislatures, due process principles that require adequate justification for making retroactive changes that defeat reasonable-reliance interests. The courts below failed to require any such justification at all.

IV. AT A MINIMUM THE COURT SHOULD HOLD THIS PETITION PENDING DECISION OF A CASE THIS TERM.

At a minimum, this Court should hold this petition pending its decision in *Stop the Beach Renourishment, Inc. v Florida Department of Environmental Protection,* No. 08-1151. That case raises the question whether the judiciary can, consistent with the Due Process Clause, retroactively eliminate property rights by reinterpreting state law. Stop the Beach Renourishment argued in its petition for certiorari that "a state court cannot by *ipse dixit* proclaim 100 years of property rights never really existed." *Stop the Beach,* No. 08-1151, Petition for Writ of Certiorari, at 20. As Justice Stewart explained in his concurring opinion in *Hughes v. Washington,* 389 U.S. 290 (1967), "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Id.* at 296–97.

CRIM eliminated Triple-S's due process rights in precisely the same manner. CRIM merely declared that the earlier grants of tax exemption were null and void and should be treated as if they never existed, despite the fact that those rulings had been in effect for over two decades and that Triple-S had investment-backed reliance interests based on Treasury having encouraged Triple-S to organize its structure and operation around those rulings.

Just as Triple-S does here, the petitioner in *Stop the Beach* specifically highlighted the retroactive effect of the change in law as the due process deficiency. The petition for certiorari in that case cited approvingly the Ninth Circuit's decision in *Robinson v. Ariyoshi,* 753 F.2d 1468 (9th Cir. 1985), *rev'd on procedural grounds*, 477 U.S. 902 (1986), in which the Ninth Circuit held that states are free to change laws by either judicial or legislative action but that *retroactive* application of a change in law was what triggered due process concerns. *Id.* at 1474. In that case, the change by the judiciary amounted to a judicial taking.

If the Court ultimately agrees with the petitioner's argument in *Stop the Beach* and holds that judicial takings through retroactive changes in state law violate the Due Process Clause, this petition should be granted and the judgment below vacated and remanded. For if a state does not avoid its due process obligation not to take property retroactively by using the judiciary to do its bidding, surely it cannot achieve the same ends by having a right retroactively stripped by an executive branch agency. Indeed, as this Court stated more than a century ago, "the prohibitions of the [Fourteenth] amendment refer to all instrumentalities of the state—to its legislative, executive, and judicial authorities—and therefore whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation of the state, violates the constitutional inhibition." *Chicago Burlington &*

Quincy R.R. Co. v. Chicago, 166 U.S. 226, 233–34 (1897) (internal quotation and citation omitted).

There should be no doubt that it would defy constitutional logic for due process to constrain the extent to which the legislative branch can make new law retroactively and the extent to which the judicial branch can make new common law retroactively, but for executive branch agencies to be immune from similar constraints when they make new law through reinterpreting statutes.

CONCLUSION

The petition for certiorari should be granted or, in the alternative, held pending resolution of *Stop the Beach Renourishment, Inc., v. Florida Department of Environmental Protection,* No. 08-1151.

Respectfully submitted,

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Appendix B

--- S.Ct. ----, 2010 WL 58369 (U.S.Puerto Rico), 78 USLW 3391
(Cite as: 2010 WL 58369(U.S. Puerto Rico))

Only the Westlaw citation is currently available.

Supreme Court of the United States

TRIPLE-S MANAGEMENT, ET AL. V. MUNICIPAL REVENUE COLLECTION.

No. 09-233.

Jan. 11, 2010.

*1 The Solicitor General is invited to file briefs in this case expressing the views of the United States.

U.S.,2010.

Triple-S Management Corp. v. Municipal Revenue Collection Center

--- S.Ct. ----, 2010 WL 58369 (U.S.Puerto Rico), 78 USLW 3391

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